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Article 31B and the Ninth Schedule of the Indian Constitution: A critical analysis

Akanksha Sharma, Research Scholar
Department of Political Science, University of Delhi

Article 31B read with the Ninth Schedule was inserted into the Constitution by the Constitution (First Amendment) Act,1951 and has been contentious and debatable ever since.The Ninth Schedule, its constitutionality and its intent have been the cause of majordebate and litigations,asmanifestedin the form of various Constitutional amendments, and judgements of High Courts and Supreme Court. Recently, when Supreme Court opined that reservations in promotion should not be considered a Fundamental Right, there were demands by a number of legislators to put reservations and quota law under the Ninth Schedule.As various such demands have been made from time to time, it becomes significant to examine the nature, scope and the frequent (mis)use of theNinth Schedule - a provision which was created as an exception to the Constitution, but gradually became a norm!

Engagement with these constitutional provisions brings to forefront various aspects of constitutionalism as they add a unique character to the Indian Constitution, by the virtue of their exceptional nature.The essay aims to look at the debates and issuesaround Article 31B, read with Ninth Schedule andthe implications ofvarious Supreme Courtjudgmentsin cases like*KesavanandaBharati*Case (1973) and *I.R. Coelho* case (2007) among others . Itfurther seeks to engage with the larger question of relationship between organs of government with reference to these constitutional provisions.

The first section of the essay gives an overview of Article 31B andNinthSchedule. The secondsection engages with the nature, scope and debatesaround the schedule and its usage. The third part seeks to examine the relationship between Executive-legislature andJudiciary with respect to Ninth Schedule.

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NINTH SCHEDULE: AN OVERVIEW

After the enactment of the constitution, the socio-economic rights were given a place under Directive Principles of State Policy which were to be 'progressively' realised, and the right to property was included in Fundamental Rights under Article 31 (which was later repealed by Constitution (forty-second amendment) Act, 1976). Indiabeing an agrarian economy, the majority of the populace was engaged in agricultural and allied activities,under the informally feudalsetup. Agrarian reforms were the need of hour and for the sake of community progress and the actualisation of socio-economic justice of this majoritypopulation, the individual right to property (especially in case of theproperty held by the*zamindars* and the like) was to be curtailed.There was a constitutional challenge as to whether a Fundamental Right could be curtailed for the enforcement of Directive Principle.

Since agriculture as well as landwerein the state list under Seventh Schedule (Entries 14 and 18 respectively, List-II, Seventh Schedule), many statesintroduced land reforms. This did not go well with the right to property, hence there were litigations. Allahabad and Nagpur HighCourts upheld the constitutionality of these state laws but in*Kameshwar Singh*case(1951), Patna High Court declared the law as constitutionally invalid. In all such cases, appeals were made in Supreme Court. However, before the Court could adjudicate the matter, theParliament enacted the Constitution (First Amendment) Act, 1951 and inserted article 31A and 31B with the NinthScheduleto the constitution. The Acts which were placed in the schedule were automatically immune from judicial scrutiny. Article 31B protected the laws from any potential future constitutional challenge that might arise on the grounds of contravention to Fundamental Rights.Moreover, the Actswere to be placed with retrospective effect, which further meant that any legislation declared invalid by Court in future could still be placed under the schedule and be treated to be present in the schedule since the beginning and hence, valid and immune from further challenge in Court.

By and large, these constitutional provisions tried to protect a particular set of laws related to land and agrarian reforms from being challenged in court on the grounds of violation of Fundamental Rights. In due course of time, the ambit of Ninth Schedule became wider and unrelated laws were also added

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(explained later with Table 2).Article 31B provides broader protection against Part-III than does Article 31A. The text of Article 31B reads as-

> "Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

The constitutionality of the schedule has been challenged before the Judiciary from time to time. In*Shankari Prasad* case (1951) and *Sajjan Singh* case(1964) the constitutionality of the schedulewas upheld on the basis of the doctrine of Pith and Substance.However, the Court held a different view in *Golak Nath*case (1967)and held that the Parliament couldn't abridge Fundamental Rights. But, it adopted the doctrine of prospective over-ruling, thereby not nullifying the amendments already made.

In *KesavanandaBharati* case (1973),theConstitution(Twenty-ninth Amendment) Act was challenged, Supreme Court devised the Basic Structure Doctrine, stating that Parliamentcould amend the Constitution without changing the basic structure. But, the basic structure was never defined and the ambit of the basic structure has been expanding since then. Invarious judgments including that of *Minerva Mills* case (1980), *Waman Rao* case (1981),different aspects of basic structure were recognised. Subsequently, in*I.R. Coelho*case (2007), Supreme Court ruled that legislations added to Ninth Schedule before 24 April 1973 (the date when the Court devised the Basic Structure Doctrine) would be immunised from judicial review but those added and amendments made after 24 April 1973 are open to judicial review and subjected to Basic Structure Doctrine.In*L. Chandra Kumar*case (1997), Supreme Court held Judicial review as an essential or basic feature of the Constitution, and hence the question of constitutionality and usage of Ninth Schedule was settled.

The First amendment to the Constitution added 13 Acts to the Ninth Schedule. Subsequent amendments, thereafter, added other legislations to the same. Thelast entry in the schedule, consisting of

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state and Central laws, as of now is numbered 284.Table 1 shows the number of entries added by various amendments:

S.No	Amendment and Year	Entries added
1	Constitution (First Amendment) Act, 1951	1-13 (13)
2	Constitution(Fourth Amendment) Act, 1955	14-20 (7)
3	Constitution (Seventeenth Amendment) Act, 1963	21-64 (44)
4	Constitution (Twenty-ninth Amendment) Act, 1971	65-66 (02)
5	Constitution (Thirty-fourth Amendment) Act,1974	67-86 (20)
6	Constitution (Thirty-ninth Amendment) Act, 1975	87-124(38)
7	Constitution (Fortieth Amendment) Act, 1976	125-188 (64)
8	Constitution (Forty-seventh Amendment) Act, 1984	189-202 (14)
9	Constitution (Sixty-sixth Amendment) Act, 1990	203-257 (54)
10	Constitution (Seventy-sixth Amendment) Act, 1994	257A (01)
11	Constitution(Seventy-seventh Amendment) Act, 1995	258-284 (27)

Table1: Entries added to Ninth Schedule during each amendment.Table created on the basis of data provided on National portalof Indiaaccessed athttps://www.india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf

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NATURE OF NINTH SCHEDULE: DEBATES AND CRITIQUE

The schedule is one of the most contentious provisions of the Constitution. Its constitutional validity, rationale, usage as well as its nature have invited criticisms. Even though the constitutionality of the schedule has been upheld, butVarious grounds of criticism still remain:

Paradoxical to Article 13, JudicialReview and violative of Part-III:

According to Singh(1995), Article 13 and Article 31B appear to be paradoxical to each other. While Article 13 obliges the State to "not make any law which takes away or abridges the rights conferred by this Part [read Part-III] and any law made in contravention of this clause shall, to the extent of the contravention, be void."; Article 31B, on the contrary, explicitly states that "none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part." Therefore, Article 31B provides an exception to the "general norm of Indian constitutional law that the fundamental rights of individuals should be kept inviolable from legislative and executive" as provided by Article 13 (Singh, 1995, p.457). The idea of judicial review as envisaged in Article 13 is paradoxical to the immunity provided to laws and legislations, which were put under the Ninth Schedule.

Noorani (2007) too questions the nature of the Ninth schedule and its impact on other articles in Part-III and calls for taking a "synoptic view of the various articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the articles in Part III."(p.734). However, according to Srikantiah (1975), Article 31B along withArticles 31A and 31C was "meant presumably to over- come the severities of Article 31 and other provisions, especially those in Part III of the Constitution which deals with fundamental rights." (p.66).Further, the retrospective effect of schedule (explained earlier), drew criticisms.Court, however, settled this question.

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Rationale and intent:

The Ninth Schedule, even though was envisioned by the same people who had also been the constitution-makers(Deva, 2016), but the rationale behind it is questioned since the Article 31B, read with the Ninth Schedule was itself a "bye-product of afterthought" (Singh, 1997, p. 457-8), inserted through Constitution (First Amendment) Act, 1951.

During the discussion of the First Amendment, many including "S.P. Mookerjee, Kunzru, Kamath, ShyamanandanShaya, Hussain Imam, K.T. Shah and Acharya Kripalani opposed the amendment" (Singh, 1997, p.460). Hussain Imam further went on to call it an "inopportune and unnecessary amendment" which was "so anti-democratic that it would be difficult to find in the annals of history a measure of this nature that had been introduced in any democracy of the world." (Parliamentary debates Vol XII-XIII (1951) as cited in Singh, 1997, p.460).

It is argued that "There was no Constitutional justification for the Ninth Schedule. If the Government had to abolish zamindari estates or nationalise industries, just and fair compensation ought to have been paid." (Datar, 2007, p 95).

Excessive Usage, Lost Focus and Irrelevance

It is criticised that from13 Actsin the beginning to over 280 Acts, currently present in the schedule, the schedule has been used excessively, without adequate thought given to each entry. Deva(2016) points towards "enmasse inclusion of laws" in the schedule. As can be seen in Table 1, Entry 257A is the only entry which was added alone, all others were put in groups, which shows how enormously the legislature-executive used a provision which was created as an exception and has become a general norm, which might lead to a "constitutional black hole". (Deva, 2016). He further adds that since the schedule contains only the title of laws, and not any substantiating content, it is a possibility that "members might not even read the legal provisions".

Dodeja (2016, p.13) too in her work, argues that the schedule has "lost focus" and has been used to "protect the potentially litigious legislations", "is and has been prone to abuse", and has acted as a "Constitutional Dustbin" due to the presence of "certain laws which are redundant today."

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Colourable Use and political overtones:

The schedule was designed to save laws related to agrarian reforms from judicial scrutiny so as to bring socio-economic justice, but eventually, many unrelated laws were added to the same. Thus, the "protectional reach"(Singh, 1997, p.466) has widened to include laws, other than which the schedule was meant for.

Table 2 shows the nature of legislations which have been added to the schedule. As can be seen, there are laws related to elections, economic offences, industries among others. To name a few: Representation of the People Act, the Election Laws Act, Prevention of Publication of Objectionable Matter Act, the Maintenance of Internal Security Act, FERA Act. This clearly points towards the "colourable use"(Deva, 2016) of the schedule.

S.No	Subjects	No. of Acts
1	Laws Relating to Agrarian /Land	249
2	Laws Relating to Industrial Development	15
3	Laws Relating to Economic offences Ex:COFEPOSA,1974,FERA1973,MRTPAct,1969 etc.	07
4	Laws Relating to Social Welfare Ex: Insurance Law, General Business (Nationalization) Act1972, Levy Sugar Price Equalization Act 1976 etc.	06
5	Laws Relating to Elections and Press i.e. Representation of the People Act 1951 with its amendment made in 1974 and 1975 and Prevention of Publication of Objectionable Matters Act 1976.	02
6	Law Relating to Reservationi.e.Tamilnadu Reservation Act 1994.	1
7	Miscellaneous Laws	04
	Total	284

Table 2: Nature of laws included in Ninth Schedule. Table copied from an un-named author's article available on

https://shodhganga.inflibnet.ac.in/bitstream/10603/39853/6/chapter%202.pdf

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Furthermore, the (mis)use of the schedule for political purposes, is also pointed towards,by various scholars. Figure 1 shows the number of acts included in the schedule by various Prime Ministers. As can be clearly concluded from Figure 1 and Table 1, the schedule was widely misused, especially during the period of Smt. Gandhi. Twenty-five out of twenty-nine 'unrelated' laws wereenacted during the Emergency imposes by Smt. Gandhi. (Deva, 2016).

To quote Noorani, while commenting on the schedule (2007, p. 731), he said, "An incongruity, introduced as a result of sheer neglect, became an obscenity created by wilful resolve."

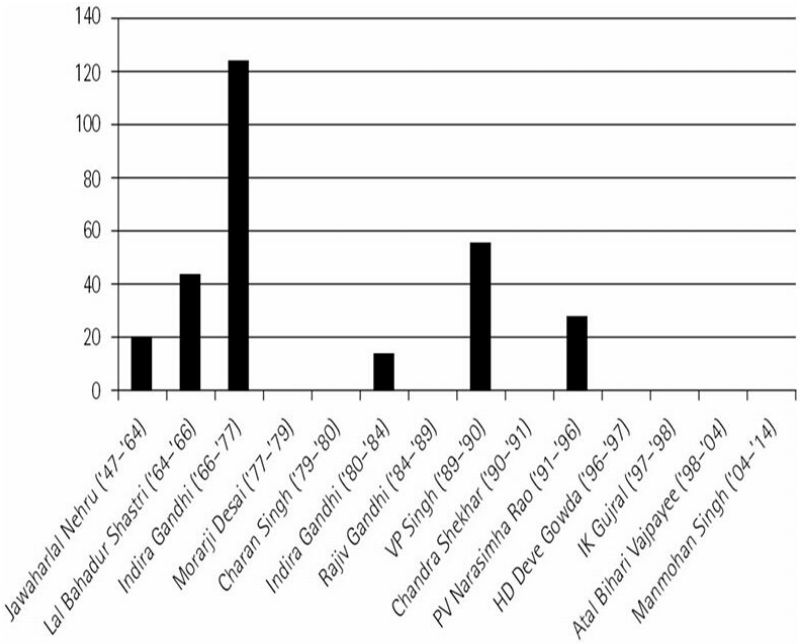

Figure 1: Laws added during the tenure of each Prime Minister from Jawaharlal Nehru to Manmohan Singh. Taken from Deva (2016).

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CHECKS AND BALANCES

Scholars try to situate the legislature's decision to enact Article 31B and Ninth Schedule in the larger context of relationship between organs of government. It is widely acknowledged that Indian Constitutionalism is not based on strict separation of power, but indeed works on the doctrine of 'Checks and Balances'.

Critics see the enactment of Article31B and Ninth Schedule as a resultof tussle between the organs of government. As per Singh, "The battle of supremacy between the legislature and judiciary...surfaced during the period of infancy of the state itself" (1997, p. 459). Judiciary wasseen as the "champion of individual rights", whereas the legislature after independence was concerned more aboutthe socio-economiccommunity rights. The

latter is directly elected, directly accountable to masses, and thus the "rationale behindfinality to legislative acts and excluding judicial review" did make sense to the legislature. (Singh, 1997, p. 457).

Dominant perception holds that legislature tried to evade judicial scrutiny and provided a 'protective umbrella' to the legislations. The Judiciary responded to the Executive-legislature. Resultantly, legislature made amendments, intensifying the battle of supremacy.Judiciary, through various judgments controlled the legislature's arbitrariness for the protection of Indian Constitution. Wahi (2015) substantiates this by saying that "behind the Supreme Court's doctrinal jurisprudence" was the "Court's fear of arbitrariness of State action."

This however, is a debatable stand. On the contrary, drawing from Austin's idea of Court being an 'arm of social revolution', Upadhyaya(1983) argues that Supreme Court has showed awareness of, and sensitivity to the needs of the country"(p. 246) while upholding the validity of agrarian reforms andNinth Schedule. He, infact,argues that after the Constitution (Fourth Amendment) Act, Supreme Court hadplayed a "creative role" as an "active agent of social change." (p.248).Challenging the dominant notion that amendments were "prompted or provoked due to decisions of court", Upadhyaya (1983, p.260) argues that they were "rather due to ambivalence in government thinking and its piecemeal approach towards the problem."

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Khosla(2007), while commenting upon judicial review, criticises the judiciary for amassing large powers and taking "judicial review beyond acceptable limits" (p.3204) on account of the ambiguity inherent in the Basic Structure Doctrine and suggests that Judiciary should itself define the basic structure so as to remove the ambiguity.

Deva (2016)however, provides an alternative reading of the provisions and sees them as a "legislative reaction to judicial overreach reflected in an overzealous protection of the erstwhile FR [Fundamental Right] to property against legislation aimed at socio economic justice." Therefore, the origin of the Art. 31-C and Ninth schedule lies in the "tussle between executive-legislature and judiciary" over the Fundamental right to property.

Scholars like Dodeja, suggest that Ninth Schedule should be repealed on account of becoming redundant. Deva (2016) on the other hand suggeststhat Courts should play a limited role and there should be a "shared constitutional space of understanding" between organs of government;Judiciary should pay adequate deference to legislature and executive. The lack of adequate deferencebetween at Deva (2016) calls "defensive devices" like Ninth Schedule and "offensive devices" like Basic Structure Doctrine.

The healthy working of Indian democracy is dependent upon a seamless relationship between Executive, Legislature and Judiciary, working towards shared national goals and ambition. Mechanisms like Articles 31B and Ninth Schedule might have been rational and significant during the time of their enactment. Post- 1995, no new law has been added to the schedule, even though demands have been made from different corners, from time to time. What nevertheless, is essential, is that such exceptional provision should remain exceptional and does not become a norm.

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References:

Beshara, C. (2015). Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India. *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, *48*(2), 99-123.

Datar, A., (2007) 'Our Constitution and Its Self-inflicted Wounds' (2007) 1 *Indian Journal of Constitutional Law*, 92-112.

Deva, S. (2016). Saving Clauses: The Ninth Schedule and Articles 31A-C. InSujit Choudhry et al.(Ed.), *The Oxford Handbook of the Indian Constitution* (pp. 627-643). Oxford University Press.

Dodeja, K. (2016). Belling The Cat: The CuriousCase Of The Ninth Schedule In The Indian Constitution. *National Law School of India Review*, *28*(1), 1-17.

Kumar, V. (2007). Basic Structure Of The Indian Constitution: Doctrine Of Constitutionally Controlled Governance [From KesavanandaBharati to I.R. Coelho]. *Journal of the Indian Law Institute*, *49*(3), 365-398.

Madhav K. (2007). The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure. *Economic and Political Weekly*, *42*(31), 3203-3204.

Noorani, A. G. (2007). Ninth Schedule and the Supreme Court. *Economic and Political Weekly*, *42*(9), 731-734.

Singh, B. (1995). Ninth Schedule To Constitution Of India : A Study. *Journal of the Indian Law Institute*, *37*(4), 457-475.

Srikantiah, L. (1975). Property Rights under the Constitution. *Social Scientist*, *3*(9), 65-71.

Upadhyaya, M. (1983). Judicial Process And Agrarian Reform. *Journal of the Indian Law Institute*, *25*(2), 238-261

Wahi, Namita, The Fundamental Right to Property in the Indian Constitution (August 10, 2015). Available at SSRN: https://ssrn.com/abstract=2661212 or http://dx.doi.org/10.2139/ssrn.2661212

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Cases cited:

Golak Nath v state of Punjab AIR 1967 SC 1643

I R Coelho v state of Tamil Nadu (2007) 2 SCC 1

Kameshwar Singh v state of Bihar AIR1951 Pat 91

KesavanandaBharati v state of Kerala (1973) 4 SCC 225

L. Chandra Kumar v Union of India (1997) 3 SCC 261

Minerva Mills v Union of India (1980) 3 SCC 625

Sajjan Singh v state of Punjab AIR 1964 SC 464

Shankari Prasad Singh Deo v Union of India AIR 1951 SC 458

Waman Rao v Union of India (1981) 2 SCC 362

Sources of tables and figure:

Table 1: Based on data available on National portal of India.

Accessedat https://www.india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf

Table 2: Directly taken from an un-named author's article available on INFLIBNET, titled Historical Background Of Ninth Schedule And Power Of Judicial Review, Accessed from

https://shodhganga.inflibnet.ac.in/bitstream/10603/39853/6/chapter%202.pdf

Figure 1: Directly taken from Deva, S. (2016). Saving Clauses: The Ninth Schedule and Articles 31A-C. In Sujit Choudhry et al. (Ed.), *The Oxford Handbook of the Indian Constitution* (pp. 627-643). Oxford University Press.